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VIA ECF

Honorable Richard J. Sullivan
United States District Judge
United States District Court, Southern District of New York
40 Foley Square, Courtroom 905
New York, NY 10007

Re: ***Johnson v. National Football League Players Association, et al.*, Case No. 1:17-cv-05131-RJS**

Dear Judge Sullivan:

We represent the National Football League Players Association ("NFLPA") in the above-referenced action. As indicated in the July 28, 2017 joint submission (Doc. No. 85), we write to request a pre-motion conference and for permission to move to dismiss, pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6), all Counts asserted against the NFLPA in Plaintiff David Lane Johnson's ("Johnson") First Amended Complaint and Petition to Vacate Arbitration Award ("FAC"). The NFLPA proposes that the pre-motion conference be conducted in conjunction with the August 25, 2017 initial conference (Doc. No. 86). Further, the NFLPA would meet and confer with Johnson and include a schedule for any such motion to dismiss briefing as part of the proposed case management plan and scheduling order that Your Honor has ordered the parties to submit.

On January 6, 2017, Johnson filed his initial Complaint in the Northern District of Ohio. The NFLPA moved to transfer the action to this District. While the NFLPA's transfer motion was pending, Johnson filed the FAC, asserting four Counts against the NFLPA: Eight and Ten (breach of duty of fair representation ("DFR")), Nine (violation of Labor-Management Reporting and Disclosure Act ("LMRDA")), and Eleven (Declaratory Judgment Act). The NFLPA moved to dismiss each of these Counts. On July 6, 2017, the Ohio District Court granted the NFLPA's transfer motion and denied its motion to dismiss without prejudice. The District Court stated in the decision that it was "address[ing] solely the issue of transfer" and that "any unaddressed issues may be raised or renewed, if permitted by the transferee court." *Johnson v. NFLPA et. al.*, No. 5:17-CV-0047, slip op. at 1 n.1 (N.D. Ohio Jul. 6, 2017).

Johnson is employed by defendant National Football League's ("NFL") Philadelphia Eagles franchise and is a member of the NFLPA, the union for all NFL players. Johnson seeks to vacate an arbitration award issued by (neutral) Arbitrator James Carter denying Johnson's appeal from a 10-game suspension for violating the NFL's Performance-Enhancing Substances Policy (the "PES Policy"). All of the injuries that Johnson avers in the FAC flow from the denial of his

arbitral appeal and the ensuing disciplinary consequences. But Johnson has not and cannot plead that any such injury is traceable to the NFLPA, nor that any alleged NFLPA conduct plausibly contributed to an erroneous arbitral decision. Rather, Johnson lost his arbitral appeal for the simple reason that he admitted to violating the Policy. The FAC—Johnson's effort to blame his union for his own conduct—should therefore be dismissed both for lack of standing under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6).

I. Johnson Failed to Meet His Burden to Plead Article III Standing Because His Alleged Injuries Are Not "Fairly Traceable" to the NFLPA's Purported Conduct

To plead Article III standing, Johnson must allege facts demonstrating that he has suffered an "injury in fact" that is "fairly traceable" to the NFLPA's purported conduct. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016); *see also Vigil v. Take-Two Interactive Software, Inc.*, No. 15-CV-8211 (JGK), 2017 WL 398404, at *6 (S.D.N.Y. Jan. 30, 2017) ("To satisfy the requirements of Article III standing, a plaintiff must show that . . . there is a causal connection between the injury and defendant's actions") (citation omitted).

Despite his myriad accusations about NFLPA conduct purportedly violating the union's DFR and its obligations under the LMRDA, Johnson's only claimed injury—the denial of his arbitral appeal and ensuing suspension and financial/contractual penalties—is "fairly traceable" to none of it. On the contrary, Johnson admitted during the underlying arbitration that he admittedly and purposely took from an unidentified "friend" a "non-FDA approved" substance that is banned by the PES Policy.[1] Johnson's injuries, *i.e.*, the disciplinary consequences of his admitted PES Policy violation, are thus "fairly traceable" only to Johnson himself.

The Award itself reinforces this point beyond any doubt. Johnson raised the majority of his FAC allegations about ostensible NFLPA misconduct during the arbitration and the neutral Arbitrator expressly rejected those arguments as meritless and also as immaterial given Johnson's admitted violation of the PES Policy. Thus, on the face of the FAC, the Court can conclude that the NFLPA's alleged misconduct did not cause Johnson to lose his disciplinary appeal because the Arbitrator expressly so ruled. Johnson cannot plausibly allege that his claimed injuries are traceable to the NFLPA. He thus lacks standing for all Counts against the NFLPA.

II. Johnson Has Failed to State Any Viable Claim Against The NFLPA

To state a DFR claim, a plaintiff must plausibly allege at least two elements: (1) "the union's actions or inactions are either arbitrary, discriminatory, or in bad faith"; and (2) there is "a causal connection between the union's wrongful conduct and [his] injuries." *Bejjani v. Manhattan Sheraton Corp.*, No. 12 CIV. 6618 JPO, 2013 WL 3237845, at *6 (S.D.N.Y. June 27, 2013), *aff'd*, 567 F. App'x 60 (2d Cir. 2014) (citation omitted). Judicial review of a union's conduct vis-a-vis its members is limited and "highly deferential." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991). "Because federal policy gives unions wide latitude to act in their representative capacity," a plaintiff must set forth "concrete specific facts" of arbitrary, discriminatory, or bad

[1] The Award and arbitral record are incorporated-by-reference into the FAC.

faith conduct by the union to satisfy the "enormous burden" to state a DFR claim. *Dillard v. Seiu Local 32BJ*, No. 15 Civ. 4132(CM), 2015 WL 6913944, at *4 (S.D.N.Y. Nov. 6, 2015) (dismissing DFR claim). Johnson's allegations—*e.g.*, concerning the NFLPA's selection of a neutral arbitrator and PES Policy administration—do not constitute arbitrary, bad faith, or discriminatory behavior as a matter of law.[2] Nor, as discussed above, is there any causal connection between the alleged NFLPA conduct and the denial of Johnson's arbitral appeal.

Moreover, because Johnson alleges that the NFL violated the Collective Bargaining Agreement in tandem with the NFLPA violating its DFR, Johnson has asserted a classic "hybrid" claim under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. As such, Johnson must plead not only that the union's alleged conduct was arbitrary, discriminatory or in bad faith, but also that it "contributed to the arbitrator's making an erroneous decision." *Roy v. Buffalo Philharmonic Orchestra Soc'y, Inc.*, No. 16-717, 2017 WL 951461, at *3 (2d Cir. Mar. 9, 2017) (citation omitted); *Nicholls v. Brookdale Univ. Hosp. & Med. Ctr.*, 204 F. App'x 40, 42 (2d Cir. 2006) (holding that union's conduct "must have seriously undermine[d] the arbitral process" and affirming dismissal of DFR claim under Rule 12(b)(6)); *Bejjani*, 2013 WL 3237845, at *8 (plaintiff can bring a hybrid claim "***only if*** the employee can show that either failure to pursue the grievance process or the unsuccessful result thereof was '***due to*** the Union's wrongful conduct'") (citation omitted; emphases added). Johnson, however, cannot plausibly aver that there was anything erroneous about the Award, much less that the NFLPA committed misconduct that violated its DFR, seriously undermined the arbitral process, and caused the outcome. For this additional reason, Johnson cannot state a DFR claim against the NFLPA under Rule 12(b)(6).

With respect to Johnson's claim under Section 104 of the LMRDA, it too fails under Rule 12(b)(6) because Johnson admits he had access to the Collective Bargaining Agreement and the PES Policy. Instead, he complains about missing "side agreements," but that is legally insufficient. *See Summerville v. Local 77*, 369 F. Supp. 2d 648, 658–59 (M.D.N.C.), *aff'd*, 142 F. App'x 762 (4th Cir. 2005). In addition, under these circumstances, Johnson cannot plausibly allege that his rights were "directly affected by" any "side agreements" concerning procedural aspects of the PES Policy that the NFLPA allegedly failed to provide him. *See Broomer v. Schultz*, 239 F. Supp. 699, 705 (E.D. Pa. 1965), *aff'd*, 356 F.2d 984 (3d Cir. 1966).

Respectfully submitted,

/s/ Jeffrey L. Kessler

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[2] For example, Johnson's allegations about the NFLPA's alleged lack of support during the arbitration do not state a DFR claim because unions have "wide latitude" in processing grievances and, in fact, do not need to pursue grievances *at all*. *Dillard*, 2015 WL 6913944, at *5 (no employee "has the absolute right to have his grievance taken to arbitration"); *Bejjani*, 2013 WL 3237845, at *11 ("unions generally enjoy broad discretion in determining when, how, and with which arguments to advance a grievance").